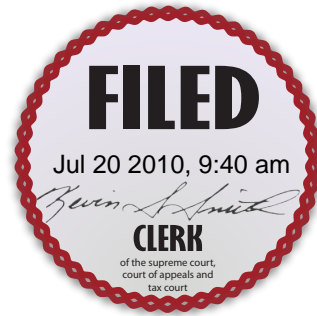


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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER W. TURNER,)

Appellant-Defendant,)

vs.)

No. 29A02-0905-CR-479

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable J. Richard Campbell, Judge
Cause Nos. 29D06-0807-FD-4263, 29D06-0808-FD-4667,
29D05-0809-FD-6190 and 6091, 29D04-0809-FD-5780

July 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

After pleading guilty to five counts of operating while intoxicated, as class D felonies, Christopher W. Turner appeals his sentences.

We affirm.

ISSUES

1. Whether the trial court abused its discretion when it denied Turner credit for a certain period when he was detained in the county jail.
2. Whether the State violated Turner's rights to due process and to not be subject to cruel and unusual punishment.

FACTS

In the early evening of May 21, 2008, officers with the Hamilton County Sheriff's Office found Turner unconscious, injured, and the sole occupant of a vehicle that had left the roadway and struck a tree. Turner was arrested, transported to the hospital, and his blood drawn for testing. Charges were not filed at that time.

On the afternoon of June 17, 2008, an officer of the Carmel Police Department stopped Turner after he observed him operating his vehicle erratically and speeding. When Turner failed multiple field sobriety tests and a breath test, he was taken to the hospital, and his blood was drawn. Turner was arrested, but he was released June 18th, having filed a \$7,500.00 bond with respect to the "pending charges." (App. 252).

In the early afternoon of June 21, 2008, an officer of the Westfield Police Department observed Turner operating his vehicle erratically on U.S. Highway 32. The officer stopped Turner. Turner failed field sobriety tests, was taken to the hospital, and his blood was drawn. Turner was arrested and jailed, but he was released two days later after the State advised the court that it was not filing charges at that time.

In the early evening of July 5, 2008, an officer of the Carmel Police Department observed Turner operating his vehicle erratically and speeding. The officer stopped Turner. After Turner failed several field sobriety tests, he was taken to the hospital and his blood drawn. Turner was arrested and jailed, but he was released two days later when the State advised the court that it was not filing charges at that time.

On July 18, 2008, the State filed charges alleging that on June 21, 2008, Turner had *inter alia* committed operating a vehicle while intoxicated, as a class D felony in cause number 29D06-0807-FD-4263 (#4263). On August 4, 2008, the State filed charges alleging that on June 17, 2008, Turner had committed two counts of operating a vehicle while intoxicated, as class D felonies, under cause number 29D06-0808-FD-4667 (#4667).

On September 4, 2008, Turner appeared for his initial hearing on #4263 (the June 21st arrest). Five days later, on September 9, 2008, an officer of the Noblesville Police Department observed Turner operating his vehicle erratically on U.S. Highway 37. The officer stopped Turner, who failed field sobriety and breath tests. Turner was taken to the hospital and his blood drawn, then arrested and jailed. On September 10, 2008, the State

charged that on September 9th, Turner had committed *inter alia* operating a vehicle while intoxicated, as a class D felony in cause number 29D05-0809-FD6091 (#6091).

On September 12, 2008, the State filed charges alleging that on July 5, 2008, Turner had committed *inter alia* operating a vehicle while intoxicated, as a class D felony, in cause number 29D04-0809-FD-5780 (#5780).

On September 16, 2008, Turner appeared for his initial hearing on #6091 (the September 9th arrest); bond was set at \$50,000.00; Turner posted the bond and was released. Also on September 16th, the State filed charges alleging that on May 21, 2008, Turner had committed two counts of operating a vehicle while intoxicated, as class D felonies, under cause number 29D05-0809-FD-6190 (#6190).

On September 23, 2008, the court revoked Turner's bond in #4263 (the June 21st arrest). Thereafter, Turner remained in jail.

On March 13, 2009, Turner signed five separate plea agreements. The agreements provided that Turner would plead guilty to five counts of operating while intoxicated, as class D felonies; and the State would dismiss numerous other charges, including five allegations that Turner was an habitual substance offender. The agreements provided specific sentencing terms, the sequence of those terms, and the concurrent or consecutive service of the respective terms.

On March 16, 2009, with the agreement of the State, Turner filed motions in the respective Hamilton County Superior Courts to consolidate the above five cases.¹ Turner's motion noted that "each agreement is interdependent upon the other agreements." (App. 37). Accordingly, the parties moved that a single court conduct consolidated guilty plea and sentencing hearings. The motion was granted.

On March 24, 2009, the trial court held the guilty plea hearing. The transcript thereof was not provided to us, but we presume that a factual basis was established for each offense -- inasmuch as the individual offense sentencing orders state the trial court's acceptance of the respective guilty pleas.

On April 22, 2009, the trial court held the sentencing hearing. Consistent with the plea agreements, the court sentenced Turner to serve concurrent terms of three years for #4263 and for #4667, giving him credit time for 434 days (217 days served plus jail credit times of 217 days, reflecting his jail detention from June 17-18; June 21-23; and September 23, 2008 – April 22, 2009). It sentenced Turner to serve three years for #5780, with credit time for six days (3 actual days plus credit time of 3 days, reflecting jail detention July 5-7), to be served consecutively to #4263 and #4667. It sentenced him to serve one year for #6091, giving him credit time for 14 days (7 actual days plus jail credit for 7 days, reflecting detention September 9-15), and ordered the one-year sentence in #6091 to be served consecutively to the foregoing four matters and before the one-year

¹ The motion actually sought to consolidate six matters, the foregoing five matters involving operating-while-intoxicated charges "and the sixth" that charged Turner with "driving while suspended." (App. 37). At the sentencing hearing on April 22, 2009, the sixth case was dismissed.

term for #6190. Finally, for #6190, the offense occurring at the earliest date – May 21st, the trial court ordered Turner to serve one year, to be served consecutively to all other sentences, for a total sentence of eight years.

DECISION

1. Credit Time

Turner argues that the trial court abused its discretion when it determined his credit time. Specifically, he contends that he is “entitled to 212 days of credit time” for the “simultaneous days” he was detained in county jail (from September 23, 2008 to April 4, 2009) “on two unrelated charges” -- #4263 (June 21st arrest) and #6190 (May 21st arrest).² Turner’s Br. at 6. Turner relies on *Muff v. State*, 647 N.E.2d 681 (Ind. Ct. App. 1995), holding that a defendant “was entitled to full credit for days served for each offense,” but he acknowledges that “more recent decisions have refused to follow *Muff*.” Turner’s Br. at 6.

We begin by noting that the standard for review of a trial court’s sentencing decision is abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g on other grounds*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.*

² We note that Turner does not make clear the two cause numbers involved, simply referring to them as “the 2nd Superior 6 case and the 2nd Superior 5 case.” Turner’s Br. at 5. The State refers to the causes as #4263 and #6190; Turner does not indicate his disagreement; and we use these cause numbers and their respective arrest dates.

Indiana law provides that a defendant “confined awaiting trial or sentencing” earns one day of credit time for each day of that incarceration. *See* Ind. Code § 35-50-6-3(a). When a defendant is incarcerated on multiple unrelated charges at the same time, it is possible that a period of confinement may be the result of more than one offense, and the defendant may receive a “full credit” on each sentence. *Diedrich v. State*, 744 N.E.2d 1004, 1005 (Ind. Ct. App. 2001). Such is not the case, however, where the defendant is “required to serve his sentences consecutively.” *Id.* at 1006.

The trial court is authorized to order that terms of imprisonment be served consecutively. *See* I.C. § 35-50-1-2. Turner’s plea agreements – accepted by the trial court after his counsel assertion that all agreements were “interdependent” (App. 37) – required that the sentence in #4263 be served “before the sentence imposed under . . . 5780, . . . 6091, and . . . 6190,” and that the sentence in #6091 “shall run consecutively after” the others. (App. 208, 132).

In *Stephens v. State*, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000), *trans. denied*, we noted that “where a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes,” he is entitled “to receive credit time applied against each separate term,” but when consecutive terms are imposed at sentencing, the defendant “is only allowed credit time against the total or aggregate of the terms.” (Emphasis added). *Stephens* found that if *Muff* “permits credit for time served against each separate sentence rather than against the aggregate of the consecutive sentences,” such would “result[] in double credit,” contrary to our Supreme Court’s

holding in *Corn v. State*, 659 N.E.2d 554, 558-59 (Ind. 1995). *Id.* at 284. Accordingly, *Stephens* “declined to follow” *Muff.* *Id.* at 284, 284-85. Subsequently, in *Diedrich*, based on “the reasons set forth in *Stephens* and *Corn*,” we again “decline[d] to follow” *Muff.* 744 N.E.2d at 1006.

The trial court had the authority to impose consecutive sentences, and Turner agreed to the sequential nature of his sentences. Consistent with the considerations of *Corn*, *Stephens*, and *Diedrich*, we find that granting Turner the 212 days jail credit time on both #4263 and #6190 would be the equivalent of his serving those sentences concurrently. Based upon the law, the facts of Turner’s offenses, and the express provisions of his plea agreements, we do not find that the trial court abused its discretion in its award of jail credit time.

2. Due Process, Cruel and Unusual Punishment

Turner further argues that the State’s “delay in filing charges and/or revoking [his] bond was done for the purpose of strengthening the State’s position and resulted in a violation of due process and guarantee against cruel and unusual punishment to [him].” Turner’s Br. at 8. He then combines the assertions and claims that the delay in charging him and revoking his bail “amounted to cruel and unusual punishment” in that it subjected him to the imposition of “additional punishment” for having committed offenses after his release on bond. *Id.* at 9, 11.

As the State properly responds, one who “pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal.” *Collins v. State*, 817 N.E.2d

230, 231 (Ind. 2004). A conviction after a plea of guilty is challenged through a petition for post-conviction relief. *Id.*

Further, Turner's argument necessarily implies that the State had knowledge that after his arrest on May 21st, Turner would not act in accordance with the law but would instead choose to commit additional criminal offenses. Certainly there is no evidence in the record to support our drawing such an inference. If he is suggesting that his guilty plea should be set aside on this basis, post-conviction relief procedures provide for an evidentiary hearing to establish any possible factual circumstances and assertions in that regard. *See Huffman v. State*, 822 N.E.2d 656, 660 (Ind. Ct. App. 2005).

Finally, the "prohibition against cruel and unusual punishment proscribes atrocious or obsolete punishments and is aimed at the kind and form of the punishment, rather than the duration or amount." *Dunlop v. State*, 724 N.E.2d 592, 597 (Ind. 2000). Turner's argument presents no claim that the nature of his punishment is "atrocious or obsolete." *Id.* His second issue must fail.

Affirmed.

BAKER, C.J., and CRONE, J., concur.